SUPREME COURT, U.S.
FILED
JUN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1541

# In the Supreme Court of the United States

OCTOBER TERM, 1987

---

DON H. MAJOR, ADMINISTRATOR OF THE ESTATE OF DEBRA LYNN SPRADLIN, DECEASED, AND CHARLES L. MAUK, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

6 pp

## TABLE OF AUTHORITIES


Page

Cases:

*Feres* v. *United States*, 340 U.S. 135 (1950) ..... 1, 4
*Gilardy* v. *United States*, cert. denied, No. 87-670 (Jan. 25, 1988) ..... 4
*United States* v. *Johnson*, No. 85-2039 (May 18, 1987) ... 4
*United States* v. *Shearer*, 473 U.S. 52 (1985) ..... 2, 3

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346(b) ..... 1
28 U.S.C. 2671 *et seq.* ..... 1

# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1541

DON H. MAJOR, ADMINISTRATOR OF THE ESTATE OF DEBRA LYNN SPRADLIN, DECEASED, AND CHARLES L. MAUK, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioners contend that the courts below misapplied *Feres* v. *United States*, 340 U.S. 135 (1950), in dismissing their damage suits and that *Feres* should be overruled.

1. Private Debra Spradlin was killed and Private Charles Mauk was severely injured when the motorcycle on which they were seated was struck by an automobile driven by William Lane, a non-commissioned Army officer. Spradlin and Mauk were parked off the road on the Fort Campbell Military Reservation at the time of the accident; they were on active duty status, but off duty. Lane had been drinking at a party on the post and was on his way home when his vehicle ran off the road and hit the motorcycle. Pet. App. 2a, 11a.

Petitioners brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States. They alleged that Army officers "negligently and wrongfully failed to supervise

and control subordinate employees who were responsible for the wrongful conduct involved in the 'party' " (Pet. App. 18a, 27a). They added that "those commanders * * * wrongfully and negligently failed to administer and implement policies, orders, and regulations of the President of the United States, the Secretary of Defense, and the Secretary of the Army, relating to the distribution and consumption of alcoholic intoxicants" (*id.* at 19a, 27a).

The district court granted the government's motion to dismiss the complaints (Pet. App. 10a-13a). The court noted that "plaintiffs' complaints challenge the conduct of Lane's superiors and fellow soldiers both in holding the party at which Lane became intoxicated and in allowing him to leave in that condition" (*id.* at 12a). It concluded, relying on *United States* v. *Shearer*, 473 U.S. 52 (1985), that the suits are barred by *Feres* because "[a] trial would involve second-guessing military orders and would very likely require members of the Armed Services to testify in court as to each other's decisions" (Pet. App. 12a).

The court of appeals affirmed (Pet. App. 1a-9a). It noted that petitioners "attempt to distinguish *Shearer* by alleging that the allegation in their complaint as to negligent supervision is merely 'alternative' and 'collateral'; [petitioners contend that] no military decision-making process is implicated because the relevant 'decision' was made when the regulations allegedly prohibiting on-base consumption of alcohol were promulgated, and this suit challenges only the *failure* to follow those regulations" (*id.* at 8a (emphasis in original)). The court found the "attempted distinctions * * * unpersuasive" since a trial "would require those superiors either in attendance at the party at which Lane became intoxicated or with knowledge of that gathering to testify about military decisions relating to the provision and/or consumption of alcohol

on base as well as disciplinary policies for infractions of such rules" (*id.* at 8a, 9a).

2. The decision below is correct and further review is not warranted. Petitioners acknowledge that their "allegations as to negligent supervision, standing alone, would be questionable" (Pet. 12 n.14). Indeed, negligent supervision claims are plainly barred by *Shearer*, which held that the plaintiff's "attempt to hale Army officials into court to account for their supervision and discipline of [an Army private] must fail" (473 U.S. at 59). Contrary to petitioners, it makes no difference that they allege that Army officers failed to enforce regulations relating to the consumption of alcohol. Their claims remain negligent supervision claims even if the allegedly negligent supervision violated regulations, and requiring military officers to testify in civilian court as to their compliance with governing regulations is just as intrusive (if not more so) as asking them otherwise to account for their supervision of subordinates. As the court of appeals concluded, it is likely that a trial of petitioners' suit would " 'call[] into question basic choices about the discipline, supervision, and control of [servicemen].' " Pet. App. 9a (quoting *Shearer*, 473 U.S. at 58 (footnote omitted)). In any event, suits where the issue is whether military officers complied with regulations in supervising subordinates are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (473 U.S. at 59 (emphasis in original)). Petitioners' claims are therefore barred.

Petitioners deny that "the existence of military 'no-fault' benefits creates yet another reason to deny Petitioners any remedy under the FTCA" (Pet. 16). However, this Court held last Term that "the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related

injuries." *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 8. Moreover, the provision of veterans' benefits responds to petitioners' complaint that Lane "could very well have struck * * * a *non-military* person" and that *Feres* would not bar the action in that event (Pet. 16 (emphasis in original)). If Lane had struck a civilian, the injured person, unlike petitioners, would not have been eligible for no-fault veterans' benefits. While, unlike petitioners, a civilian would not be barred by *Feres* from suing the government, a civilian would have great difficulty recovering from the government under the facts of this case since Lane was not on government business or driving a government car when he ran off the road.

Petitioners also suggest that "the time has come to * * * repeal *Feres*" (Pet. 10). However, *Feres* was reaffirmed last Term in *Johnson*. This Term, the petitioner in *Gilardy* v. *United States* suggested overruling *Feres* and the Court denied the petition (No. 87-670 (Jan. 25, 1988)). There is no reason to revisit that question now. As the Court stated in *Feres*, "Congress possesses a ready remedy" (340 U.S. at 138) if it disagrees with this Court's construction of the FTCA, but it has not taken action to overrule *Feres* legislatively in the 38 years since that decision was announced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60487